1987

Emanuel N. Onyeabor v. Pro Roofing, Inc., a Utah corporation, and Pam Bates : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

EMMANUEL N. ONYEABOR, Appellant, v. PRO ROOFING, INC., a Utah corporation, and PAM BATES, Respondents.	)	Case No. 87-0265-CA #14B

APPELLANT'S BRIEF

Appeal from Judgment on Jury Verdict and
Orders Denying Motions for New Trial
and an Additur,
Entered by the Honorable Bryant J. Croft
Judge Pro Tem of the Third Judicial District Court,
Salt Lake County, State of Utah

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36. Affidavit of Linda J. Gummow, Ph.D. (Neuropsychologist) regarding judge's non-verbal comments on the evidence.

37. Affidavit of Brian D. Burns, D.C., regarding judge's non-verbal comments on the evidence.

38. Affidavit of Robert W. Jinks, Esq., regarding judge's non-verbal comments on the evidence.

39. Affidavit of Kay Nebeker, regarding judge's non-verbal comments on the evidence.

40. Letters of William J. Stegall, Esq., to Robert B. Sykes, attorney for Mr. Onyeabor dated 12/22/86, 1/14/87 and 12/21/87; no mention of Dr. Lincoln Clark as a witness.

41. Lincoln Clark, M.D., independent medical evaluation dated 2/3/87.

42. Exhibit 75 - purchase order wrongfully excluded by the court as evidence.

43. The court's jury instructions numbered 16, 20, 21, erroneously advising the jury on the law as applied to Mr. Onyeabor.

44. Defendant's answers to interrogatories regarding witnesses, required to be updated under Rule 26(e)(1).

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INTRODUCTION

In this brief, the parties and key witnesses will be referred to as follows:

"Mr. Onyeabor" -- Emmanuel Onyeabor, the plaintiff, age 29 at the time of the accident; a native of Nigeria.

"Liz Onyeabor" -- The wife of Emmanuel Onyeabor.

"Mrs. Bates" -- Pam Bates, one of the defendants, and wife of the owner of the corporate defendant, Pro Roofing, Inc.

"Pro Roofing" -- Pro Roofing, Inc., a Utah corporation, owned in part by Phil Bates, husband of Pam Bates.

"Dr. Clark" -- Lincoln Clark, M.D., a psychiatrist at the University of Utah who testified on behalf of the defense.

Other witnesses will be identified in the context of the argument presented.

The record will be referred to as "(R. ___)." References to the transcript will be designated as "(T. M- ___)," using the clerk's volume reference (19 volumes, A through S) and the reporter's page numbers. When certain lines on a page are referenced, for example Volume D, page 126, lines 3-14, this format will be used: "(T. D-126:3-14)." Exhibits will be referred to as "Ex. ___," and pages within exhibits as "Ex. 38:1, 5, 8," to refer to pages 1, 5 and 8 of Exhibit 38.

The Appendix will be abbreviated as "App." Some important sections of transcript and frequently referred-to exhibits are attached in the separately-bound Appendix.

JURISDICTION

The Court of Appeals has jurisdiction over this matter by virtue of Utah Code Ann. 1953 §78-2a-3(h) (1987) and Utah Code Ann. 1953 §78-2-2(3)(i) and (4)(g) (1987). This is an appeal from a district court directly to the Utah Supreme Court, which has been "poured over" to the Court of Appeals.

NATURE OF PROCEEDING BELOW AND STATEMENT OF THE CASE

The appellant in this case, Emmanuel Onyeabor, filed an action in Third District Court of Salt Lake County based upon personal injuries that he received in an automobile accident that occurred on June 15, 1984. Mr. Onyeabor sustained a closed-head, organic brain injury as well as a herniated lumbar disc. The case was tried to a jury beginning February 2, 1987, and continuing through February 18, 1987, when the jury returned a verdict in favor of plaintiff, but awarding only the sum of $16,850.00. The verdict was reduced by 25% due to a finding of contributory negligence on the part of Mr. Onyeabor (R. 658). A motion for a new trial and for an additur were both denied on April 1, 1987 (R. 720-1). This appeal was timely taken from the Judgment on Jury Verdict and the Order denying the Motion for a New Trial and Additur with Notice of Appeal being filed on April 30, 1987 (R. 722).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the court make comments on the evidence which indicated a preference for the defendant's side of the case?

2. Did the trial court comment on the evidence by exhibiting a hostile, negative attitude toward Mr. Onyeabor's case by means of its demeanor, facial expressions, tone of voice, and harsh manner in addressing plaintiff's counsel?

3. Should the court have excluded the surprise testimony of Dr. Lincoln Clark, a psychiatrist, where notice of this expert witness was not submitted to Mr. Onyeabor until six (6) business days prior to trial?

4. Did the court erroneously exclude other relevant evidence?

5. Did the court commit reversible error by instructing the jury that it could find Mr. Onyeabor to be contributorily negligent where the evidence was insufficient to establish his failure to keep a proper lookout or to drive at a safe speed under the conditions?

6. Was there insufficient evidence to justify a verdict for the defendants that Mr. Onyeabor was 25% negligent, and that his total damages amounted to only $16,850.00?

7. Did the court abuse its discretion in failing to grant plaintiff's Motions for an Additur or New Trial?

8. Though some errors individually might not be grounds for reversal, did the collective weight of the numerous errors in this case deny plaintiff a fair trial?

STATEMENT OF FACTS

A. DETAILS OF THE ACCIDENT

On June 15, 1984, plaintiff was employed as a carpenter on a construction project in Midvale, Utah. He was traveling home for lunch at approximately 1:10 to 1:20 p.m. (T. I-81), proceeding north on 900 East, approximately 250 to 300 feet from the intersection of 7100 South (T. C-115-117, K-49:20; Ex. 5). The posted speed limit was 45 mph and he was traveling approximately 40 to 45 mph (T. B-58; I-81).

The defendant, Pam Bates, had just stopped at a bank in a shopping center on the east side of 900 East and was on her way to perform an errand for her husband's company, defendant Pro Roofing. She intended to leave some papers at Pro Roofing, which required her to travel westbound on 7100 South (T. L-14-15).

Ninth East is a four-lane highway divided by a median strip. It has two lanes northbound and a left-hand turn lane for westbound traffic, which begins approximately 100 feet from the white lines marking the crosswalk of the intersection (Exs. 1, 4). There is also a right-hand turn lane which begins slightly south of the point where defendant's vehicle entered the roadway (Ex. 1).

Mrs. Bates' vehicle pulled to the edge of 900 East and stopped to observe the traffic (T. L-16), while she looked in a southerly direction. At that time, her vehicle would have been situated approximately ten feet to the north of the telephone

pole shown in Exhibit 4, pictures A, B, I and J, with the front of the vehicle pointed almost due west (T. B-53). She was intending to make a left turn (i.e., westbound) onto 7100 South, approximately 100 feet to her north at that moment. She drove directly across the three traffic lanes (the right-hand turn lane and the two northbound lanes) at almost a right angle in order to get into the left-hand turn lane on 900 East (T. B-50, K-49:12 and C-108:12), so that she could turn west.

The Bates' vehicle was struck by Mr. Onyeabor's vehicle a few feet north of the "hash marks" on the road as shown on Exhibit 4, photographs C, D, E, K and L (T. C-74-75). Mrs. Bates indicated to the investigating officer that she didn't see the plaintiff's vehicle "because of a white truck" (Ex. 2; T. B-47). The plaintiff's vehicle skidded approximately 105 feet (Exs. 2, 5A). The turn in the skid was intended to show the relative location of the point of impact (T. B-56; Ex. 5A). This would indicate approximately 60 feet of skid prior to the impact and 45 feet after impact (T. C-113:6).

The right side of the plaintiff's vehicle impacted the left rear bumper of the Bates' vehicle at the door joint (T. C-69), causing plaintiff to lurch violently forward (T. C-122). The place where the bumper of the Bates' vehicle "hooked" into the side of the plaintiff's vehicle is shown in Exhibit 2, pictures B, C and D. Mr. Onyeabor testified that his left wheels also struck the median strip causing him to be jostled severely (T. C-118-119, 122) and causing tire damage (Ex. 8). He also lost the steering wheel momentarily at approximately the time of

impact (T. I-84), causing his body to be a "free object" in motion inside the car (T. C-122:12-25).

Mr. Onyeabor testified that his head struck the steering wheel and/or parts or the left top interior of the vehicle (T. I-84). The position in which Mr. Onyeabor, a large man, was sitting in this particular vehicle lend strong support to that theory, as shown by Exhibit 3, photographs A through I, particularly photograph K.

Based upon the testimony of Dennis Andrews (a former highway patrolman and an accident reconstruction expert), it was estimated that Mr. Onyeabor's vehicle was traveling at approximately 28 to 33 mph at the time of impact. Mr. Andrews estimated the Bates' vehicle to be going north at approximately 5 mph (T. C-108), and Mrs. Bates estimated her speed at "under 10 mph" (T. L-17). This means that the speed differential of the vehicles was approximately 23 to 29 mph at impact (T. C-108). Officer Leavitt estimated Mr. Onyeabor's vehicle to have a speed of 15 to 20 mph at impact for a speed differential of 10 to 15 mph (T. C-64). Both of these gentlemen were of the opinion that this would probably cause Mr. Onyeabor to strike his head on the steering wheel with some significant force (T. C-72 and C-122).

B. COMMENTS ON THE EVIDENCE

The court made numerous prejudicial comments on the evidence in at least the following respects: the court expressed opinions on the believability of expert witnesses and the quality of the evidence; the court questioned witnesses; the court made prejudicial statements regarding the use of exhibit notebooks by

the jury, in front of the jury, which tended to cast the documentary evidence in the case in a negative light; the court allowed counsel to argue the admissibility or non-admissibility of evidence in front of the jury, during which argumentation prejudicial comments were made by the defense; the court made extraneous prejudicial statements in ruling on the admissibility of certain evidence, which was prejudicial; the court unduly limited Mr. Onyeabor's cross-examination of witnesses; and the court repeatedly interrupted counsel and witnesses without cause and made numerous prejudicial comments in so doing (see Tables I and II below). These facts are discussed in more detail in Point I below with numerous additional citations to the record.

From the very outset of the case, there was an attitude of distrust and prejudice exhibited toward Mr. Onyeabor and his counsel. This attitude was reflected in the court's demeanor including facial expressions, sighs, frowns, and body language (Apps. 36-39). This attitude was also shown by the frequent refusal to allow counsel to approach the bench on important issues (T. B-46, C-76, I-103). In general, the court was very harsh with Mr. Onyeabor's counsel in front of the jury, particularly during the first three days of trial (T. D-443-444).

C. FACTS REGARDING DR. LINCOLN CLARK

During the course of the litigation of this case, there were five separate trial dates set: 8/14/85, 4/18/86, 11/17/86, 12/8/86 and 2/2/87 (R. 18, 100, 124, 199, 302). Mr. Onyeabor's current counsel entered the case in July of 1986, and promptly amended the complaint, setting forth the issue of brain injury

and damages more precisely (R. 145). Since the trial was at that point scheduled for November 17, 1986 (R. 124), the defense immediately moved for an independent mental examination of the plaintiff under Rule 35, Utah Rules of Civil Procedure, with the examination to be performed by Edward C. Beck, Ph.D., a psychologist (R. 155). Dr. Beck apparently got sick, so on November 8, 1986, defendants again moved for a continuance of the trial (R. 252). That motion stated the following regarding the planned efforts to obtain a new defense expert:

> The undersigned further represents that he will use all reasonable efforts to obtain the services of a substitute expert as rapidly as possible consistent with an adequate presentation of the case. The undersigned further represents that he will use all reasonable efforts to cooperate with plaintiff's attorney in providing an opportunity to him to discover the substance of the expert's evaluation and opinion. (Emphasis added)

(R. 255). On November 10, 1986, the Motion for Continuance was heard, and the court continued the trial until December 8, 1986 (R. 199).

During that period, the defendants procured a substitute expert, Dr. Lincoln Clark, a University of Utah psychiatrist. For some reason, Dr. Clark was not able to examine Mr. Onyeabor until December 2, 1986 (T. L-88). After his examination, Dr. Clark told defense counsel that he was frightened by Mr. Onyeabor, and that he did not wish to participate any further and would categorically not be a witness at the trial (T. S-19). Dr. Clark admitted that he had not been threatened by Mr. Onyeabor; he was simply fearful (T. S-18:6).

Defendants moved for a continuance, which was strenuously opposed by Mr. Onyeabor because of his medical and psychological condition (T. S-19-21). Dr. Clark was thereafter summoned before the court on December 5, 1986, and examined on the record by Judge Dee. Dr. Clark testified that he would not under any circumstances testify at trial and that his decision was final and irrevocable. He stated:

> ... I've already expressed I want out of this. I mean I made that very clear at the beginning. And I regret the inconvenience and everything else it has caused, and I wish it could be otherwise. I would otherwise be happy to proceed even with this short notice involved -- that's involved. But I simply -- and I say I thought about this very seriously before I came to this conclusion because I had a certain reputation -- myself, I'm concerned about as a witness, and I don't want to compromise that, but I am not about to take, as I look at it, an unreasonable risk to myself and my family and the apprehensions this could cause. And I'm not going to change my mind. (Emphasis added)

(T. S-18-19).

Based upon these circumstances, Judge Dee reluctantly ordered a fourth continuance of the trial to allow the defendants to procure yet another substitute expert witness in the head injury area to replace Dr. Clark (T. S-26-27). On December 16, 1986, Mr. Stegall confirmed to Mr. Onyeabor's counsel that the defense expert would be Dr. Robert Cook. On December 17, 1986, the parties appeared before Judge Dee for a scheduling conference, and the new trial date of February 2, 1987, was set (R. 302). Mr. Onyeabor was examined by Dr. Cook in Salt Lake

City, in mid-January (T. K-89), and his deposition was pre-scheduled with counsel for Monday, January 26, 1987, in Denver (App. 40, p. 3).

On Thursday, January 22, 1987, exactly six business days prior to trial, Mr. Onyeabor's counsel received a revised witness list from Mr. Stegall (R. 308), which included Dr. Lincoln Clark as a proposed witness! This was the first notice that Mr. Onyeabor had regarding the possibility that Dr. Clark would again be a witness since the time of his "irrevocable" withdrawal from the case on December 5, 1986. Mr. Stegall was out of town from Friday, January 23, 1987, until Tuesday, January 27, 1987.

It was difficult to schedule a Motion in Limine because Judge Dee was retiring effective January 31, 1987, and he felt that the judge assigned to trial should hear any such motions. The first opportunity to schedule a motion before Judge Croft was Friday, January 30, 1987, and Judge Croft denied the Motion in Limine (R. 326; T. Q-54).

At the hearing on the Motion in Limine, Mr. Stegall indicated that he had known about Dr. Clark's availability since "the first part of January" (T. Q-38). Dr. Clark testified at trial that he decided to come back into the case some time around Christmas 1986 (T. L-127-128). Nothing about the possibility of Dr. Clark's reappearance was ever communicated to plaintiff's counsel despite many opportunities (App. 40).

Mr. Onyeabor's counsel did not receive a written report from Dr. Clark on the results of his examination until the third

day of trial, February 4, 1987. The report was incomplete in that it did not render a diagnosis of Mr. Onyeabor (App. 41:7).

Dr. Clark testified convincingly at trial (L-76-80, 91-3, 94, 96-97, 103-104, 156-158, 192-193), rendering an opinion that Mr. Onyeabor suffered numerous pre-existing psychological problems (T. L-192-193).

These facts are further amplified in Point II below.

D. FACTS REGARDING THE EVIDENCE

The facts relevant to the evidentiary errors are as follows:

The court excluded Exhibit 114, a video tape of a crash, relevant to show the probability of head injury (T. C-146, 122-128), despite significant testimony that the tape illustrated the principle of sudden deceleration (T. C-124-126). On several occasions, the court prohibited or seriously hindered counsel from establishing scientific treatises as authoritative, or using them in cross-examination of defense witnesses (T. M-32-36, 37-39, 49-53; D-444-445, 452; F-841-842). The court excluded the testimony of important rebuttal witnesses (T. M-97-102). The court refused to allow Mr. Onyeabor's wife to render important testimony regarding his future plans which was relevant to lost earning capacity (T. J-143). The court refused to allow Officer Leavitt to testify as to who was at fault in causing the accident (T. B-59-62). The court excluded Exhibit 75, a purchase order, offered to show that Mr. Onyeabor had a substantial business in Nigeria, and therefore had lost substantial earning capacity due to the accident (T. G-152). Additional facts having to do with these evidentiary matters are discussed below in Point III.

SUMMARY OF ARGUMENT

1. The court repeatedly commented on the evidence throughout the trial. Many of the comments on the evidence came in the form of direct statements that indicated the court's view on the quality or credibility of the evidence, and favored the position of the defendants. The court also interrupted and interjected comments in such a manner as to indicate the court's attitude towards the merits of the cause. The court's demeanor, including facial expressions, body language, tone of voice, harshness towards plaintiff's counsel, and other similar things, indicated that the court disbelieved Mr. Onyeabor's witnesses and was hostile to Mr. Onyeabor's case. The cumulative effect of these actions was severely prejudicial and constituted reversible error.

2. Dr. Lincoln Clark, a University of Utah psychiatrist, was hired as a defense expert witness but later stated that he was withdrawing irrevocably from the case. He did not write a report and was not deposed. Defendants procured another expert. Six business days before the new trial date, Dr. Clark's name was again submitted as an expert; his written report was not provided until the third day of trial. Plaintiff did not have time to do discovery on Dr. Clark's opinion and his presence in the case was highly prejudicial to plaintiff.

3. The court excluded several significant pieces of evidence which affected the outcome of the case. For example,

the court refused Exhibit 114, a video tape showing an automobile crash at 5 and 21 mph, wherein the "dummy" driver in each case struck its head on the windshield hard enough to make a significant bulls-eye breakage pattern. This could have helped to disprove defense claims that this accident was too mild to cause the brain injury complained of by Mr. Onyeabor. Other significant evidence was also excluded.

4. There was no evidence that Mr. Onyeabor was in any way negligent, or contributed to the cause of the accident. The court nevertheless instructed the jury that it could find Mr. Onyeabor contributorily negligent on the theory that he might have been driving too fast for conditions, or might have failed to maintain a proper lookout. As a result, the jury was confused and found Mr. Onyeabor 25% negligent.

5. The verdict finding 25% negligence on the part of the plaintiff and awarding only $16,850.00 in damages was the result of passion and prejudice. Mr. Onyeabor undisputedly received a herniated disc from the accident, and there was no substantial admissible evidence to contest the fact that he had a brain injury with significant impairment resulting therefrom. The court should have granted an additur in the amount of at least $300,000.00, or, in the alternative, a new trial.

POINT I.

Comments On The Evidence Prejudiced The Jury

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO COMMENT ON THE EVIDENCE EITHER DIRECTLY BY ORAL STATEMENTS OR INDIRECTLY IN THE FORM OF ITS DEMEANOR, FACIAL EXPRESSIONS, AND THE LIKE. THE CUMULATIVE EFFECT OF REPEATED INTERJECTIONS BY THE COURT WITH RESPECT TO THE QUALITY OR BELIEVABILITY OF THE EVIDENCE CONSTITUTED REVERSIBLE ERROR.

STANDARD OF REVIEW AND APPLICABLE RULES OF LAW

Rule 51, Utah Rules of Civil Procedure provides: "The Court shall not comment on the evidence in the case ..." It is error for the court to comment on the quality or credibility of the evidence in such a way as to indicate that it favors the claims or the position of either party. State v. Sanders, 27 Utah 2d 354, 496 P.2d 70 (1972); State v. Long, 721 P.2d 493 at 496 (Hall, C.J. concurring and dissenting) (Utah 1986). Chief Justice Hall stated the rule and its basis as follows:

> [A] trial judge is not permitted to comment on the quality or credibility of the evidence and may not indicate that the evidence is either weak or convincing. ... The court is ... enjoined from commenting on the quality or credibility of the evidence in such a way as to indicate that it favors the claims or position of either party. The enjoinder is necessary to prevent any intrusion upon the prerogatives of the jury to judge the credibility of the evidence and to determine the facts. (Concurring and dissenting opinion) (Emphasis added)

Id. at 496.

If the error was of sufficiently substantial a nature that it is reasonable to believe that it adversely affected the appellant or deprived him of a fair trial in such a way that in the absence of the error there is reasonable likelihood that the outcome would have been different, reversal is warranted. Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811, 814 (1972); Matter of Kesler, 702 P.2d 86, 96 (Utah 1985).

Direct statements by a judge can obviously constitute comments on the evidence. The court's demeanor, however, including facial expressions, gestures and actions, can also amount to a comment on the evidence. Egede-Nissen v. Crystal Mountain, Inc., 606 P.2d 1214 at 1222 (Wash. 1980). Furthermore, if either a statement or an action can be reasonably interpreted to indicate the court's belief or disbelief concerning the veracity of witnesses, it falls in the category of a comment on the evidence. Id. Comments made during a trial which influence the jury concerning the merits of the case, or which affect substantial rights of litigants, constitute grounds for reversal. Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121 at 129 (Okla. 1984).

Interjections and interruptions may constitute a comment on the evidence, particularly where they occur or are "phrased in a manner indicative of the court's attitude towards the merits of the case ..." Egede-Nissen, supra at 1222. The cumulative effect of repeated interjections by the court or comments on the evidence may constitute reversible error, even though each such interjection, standing alone, might not be error. Egede-Nissen, supra at 1223.

ARGUMENT

- Introduction -

The allegation that a trial court prejudicially interjected itself into a trial should not be lightly made; nor when made, should it be slighted by a reviewing court. Egede-Nissen, supra at 1221. The allegations made in this case are not lightly made. In nearly 14 years of practice, counsel has never encountered a situation such as that which occurred in this trial. The arguments made herein, though strong, should not be viewed as a personal attack on the trial court. The sad events which transpired in this trial undoubtedly were not consciously intended to cause damage to Mr. Onyeabor. Nonetheless, the incidents occurred as reported herein and cannot be ignored if justice is to be done.

There was potential for prejudice in this case from the outset, even under the best of intentions. For example, the possibility of racial prejudice on the part of the jury was strong, regardless of attempts to guard against it. Mr. Onyeabor is black and foreign. He was a citizen of the African country of Nigeria and spoke with an accent. He was married to a caucasian woman, Liz Onyeabor, who was an important witness for him; she was eight months pregnant at the time of the trial. It is highly unlikely that the average jury venire would admit racial prejudices in an open courtroom on voir dire. It was, therefore, extremely important that the court itself make every effort to avoid any appearance of prejudice or bias.

- The Judge's Comments On The Believability And Quality of Expert Testimony Prejudiced The Jury -

One author recently commented on the importance of a judge at trial as follows:

> To whom does a jury look first for guidance in the course of a trial? The trial judge, of course. Everyone knows that lawyers can't be trusted and the parties have axes to grind. But the judge is impartial. The judge is knowledgeable. The judge wears a robe! The judge is the monarch, and the courtroom is the kingdom. It helps a party if the jury thinks that the judge is sympathetic to that party's cause, but most trial judges try hard not to show favoritism in front of the jury. (Emphasis added)

The Trial Practice Newsletter, David F. Binder, Esq., p. 2, Shepard's/McGraw-Hill, February 1987. Jurors tend to look upon the judge with a great degree of faith. They have no idea whether the judge is making an erroneous ruling or is otherwise acting improperly. If the jury perceives that the judge favors one side in a given case, it is devastating to the hapless opponent. This happened at the Onyeabor trial.

The trial judge commented directly on the believability or quality of the plaintiff's expert testimony on at least 14 occasions during the 12-day trial (See Table I). For example, Mr. Onyeabor attempted to prove the economic value of his future lost earning capacity by establishing that he had developed "worker skills" by virtue of his occupation in Nigeria that were transferable to occupations in the United States. To do this, Mr. Onyeabor called as an expert witness Mr. Alan Heal, a certified rehabilitation counselor with a master's degree in vocational rehabilitation counseling. Mr. Heal had ten years

TABLE I

DIRECT COMMENTS ON EVIDENCE BY TRIAL COURT

Very Serious

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Comment on Evidence
1.	8 - 2/11	Alan Heal (P)	J 175-180, 182	Court expresses doubt that Mr. Onyeabor will ever go out and get a job as a superintendent of a construction project; casts doubt on Heal's opinion as to what Onyeabor would have made and interjects statements that emphasize that Heal's opinion is not valid for the U.S. but only for Nigeria; casts doubt upon Onyeabor's income potential.
2.	8 - 2/12	Boyd Fjeldsted (P)	K 18-22	Judge casts doubt on validity of expert's testimony as to value of lost future earnings by referring to it as "pure speculation"; reveals his opinion of Mr. Onyeabor's earning potential by allowing only testimony of $5.00 per hour.
3.	7 - 2/10	Edward Spencer M.D. (D)	I 45-46	Interjects comments that emphasize negative aspects of witness's testimony about Onyeabor.
4.	11 - 2/17	Linda Gummow, Ph.D. (P)	M 29-30	Judge offered opinion that counsel had not asked a certain question; (he was wrong - see T. 193-4 (2/12)).
5.	7 - 2/10	Linda Gummow, Ph.D. (P)	H 29-31	Court indicates sua sponte opinion that expert is not qualified to render an opinion as to whether Onyeabor was unconscious at scene because expert wasn't present.
6.	3 - 2/04	Thomas Soderberg, M.D. Gerald Moress, M. D. Richard Nielsen, M.D. (P)	D 325, 333, 348, 382, 383, 443, 444	Judge discredits documentary evidence by making disparaging comments about use of exhibit notebooks given to jurors at beginning of trial; severely scolds counsel in front of jury.
7.	11 - 2/17	Linda Gummow, Ph.D. (P)	M 49-53	On issue of using treatises to rebut prior witness's testimony, judge makes numerous comments that cast discredit upon plaintiff's expert by expressing dubiety on methods employed by the witness.

TABLE I CONTINUED

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Comment on Evidence
				Serious
8.	2 - 2/03	Dennis Leavitt, (P)	C 76-79	Judge expresses doubt that Onyeabor's car struck center median, causing him to be jostled; casts plaintiff's theory of mechanism of injury into doubt; and cross-examines witness.
9.	2 - 2/03	Dennis Leavitt, Officer (P)	C 72	Judge comments that the officer's experience did not justify him in expressing opinion that Onyeabor could have struck head; casts doubt on plaintiff's theory of head trauma causing brain injury.
10.	3-4 - 2/04-2/05	Richard Goka M.D. (P)	D 483-E 495-6	Judge says he is "troubled" by a glossary of terms and states that most words used by the doctor "don't mean a thing to us ... I am sure they don't to the jury"; effectively casts doubt on testimony of expert medical witnesses.
11.	5 - 2/06	Linda Gummow Ph.D. (P)	F 845	Judge interjects sua sponte and cuts off witness who is explaining future risk of head injury to plaintiff; thereby implies little risk.
				Important
12.	3 - 2/04	Patrick Chukwu (P)	D 295	Judge refers to Nigerian witness as one of "these young ones," demeaning this witness and other younger Nigerians who had previously testified.
13.	8 - 2/11	Elizabeth Onyeabor (P)	J 132-135	Casts doubt about ability of wife to have knowledge of and comment on why plaintiff took certain classes more than once, and why he had certain grades.
14.	2 - 2/03	Dennis Andrews (P)	C 142-144	Questions witness sua sponte about details of accident leaving impression that witness was perhaps not thorough.

experience in the field, and was well-qualified to assess impaired earning capacity (T. J-150-154).

Mr. Heal determined Mr. Onyeabor's pre-existing worker traits by an examination of his work life prior to the accident (T. J-153). He valued those traits in part by the income Mr. Onyeabor made in Nigeria, together with his job history and worker traits (T. J-153-157). (Mr. Onyeabor had produced a tax certificate and evidence of the exchange rate; See Exs. 12 and 13.) Mr. Heal considered both Nigerian and U.S. jobs when he formed his opinion as to impaired earning capacity (T. J-175).

Mr. Heal was asked the value of the impaired earning capacity, and the defense objected claiming that the value depended on whether Mr. Onyeabor returned to Nigeria (T. J-176). The court then interjected several prejudicial comments in the presence of the jury about the quality and believability of this testimony (See Appendix 1):

> (The Court) If he [sic] assuming that he can step out into the job as superintendent in a construction job, that's in the United States, at that point in time we don't know. ... Well, I think I will let him testify to that in case the jury thinks Mr. Onyeabor could go out and get a job of a superintendent of a construction based upon the evidence that they have heard. Then they can use that figure. If they don't [i.e., believe the evidence] they don't need to. (Emphasis added)

(T. J-176:23, 177:17; App. 1). After considerable argumentation in front of the jury as to the appropriateness of the occupational expert's assumptions (T. J-178-179), Mr. Heal stated that he had directly observed the activities of "job

superintendent." Based on this observation in combination with Mr. Onyeabor's job history, Mr. Heal believed Mr. Onyeabor could be a job superintendent. Mr. Onyeabor's counsel asked about the income of a person with the skill description of job superintendent (T. J-179:21). Mr. Heal's answer was based upon his opinion of Mr. Onyeabor's capacity to perform this type of work (T. J-180:1-9). The court then observed, with a note of doubt: "Well, that may be his opinion, yes" (T. J-180:10). The court indicated further doubt about the quality of the testimony when it said a few lines later:

> Well, that's where these United States jobs, it seems to me, are relevant and important in his opinion. (Emphasis added)

(T. J-180:16; App. 1). This sounds like defense closing argument, i.e., Mr. Heal's testimony was suspect because his evaluation of impaired earning capacity was based in part upon what Mr. Onyeabor did in Nigeria (see also J-182:8), and what he did in Nigeria is not trustworthy. The evaluation of Mr. Heal's testimony should have been left to the jury. The court should not have intervened on the side of the defendant.

The next day, the court seriously compounded this error with another comment on the evidence. Mr. Onyeabor called Boyd Fjeldsted, a Senior Research Economist at the University of Utah, to place an economic value upon Mr. Onyeabor's loss (App. 2). Mr. Fjeldsted was asked about a number of possible scenarios for a starting wage, given Mr. Onyeabor's history. At that point, the judge jumped in with these extremely prejudicial comments, apparently designed to emphasize the defense viewpoint that any

consideration of the work skills gained by Mr. Onyeabor in Nigeria was somehow irrelevant:

> MR. SYKES: ... I am trying to make a differential calculation that would take some of this into account, presumably. That's what I am trying to do.
> THE COURT: Well, what did he do Mr. Fjeldsted? Did he give any consideration to his earning rate -- his earning rate in this country?
> MR. SYKES: I think by the --
> THE COURT: Just answer the question. Did he give any consideration to that earning rate since he has been in this country in making any calculation? (Emphasis added)

(T. K-18-19; App. 2). After some discussion about the basis of the calculation, the court further commented:

> Seems to me it is pure speculation in the first year he is going to make $6.00 an hour, and the next year $10.00 an hour, and the next year $15.00 an hour. I think that is pure speculation. ... Well what hourly rates are you using? Did you have him use in this?
> MR. SYKES: I can either show them to you or I can tell you right now.
> THE COURT: Well, show them to me. The trouble with this, as far as I am concerned, is that it assumes facts that are clearly not in evidence, and we have no basis for believing that this progress will be one that should be considered rather than a thousand others, you see. (Emphasis added)

(T. K-20:4, 21:17).

The judge finally allowed in only testimony to the effect that Mr. Onyeabor could make $5.00 per hour for the rest of his life (T. B-22:8), despite significant expert testimony by Mr. Heal to the contrary (T. J-153-157). A reasonable jury would conclude that the court personally believed that Mr. Onyeabor's evidence on earning capacity of $40,000 per year was greatly

exaggerated because the court had indicated that the only believable evidence on Mr. Onyeabor's capacity was $5.00 per hour. That should have been solely the jury's decision.

The judge was very one-sided in his interjections and comments, which tended to emphasize negative aspects about Mr. Onyeabor. For example, during the cross-examination of Dr. Edward Spencer, a well-known, defense-oriented orthopedic surgeon (App. 3), Mr. Onyeabor's counsel quoted a section of Dr. Spencer's report with the intention to question him on how it related to a previous medical examination. (T. I-45:20). The court interrupted sua sponte and interjected a gratuitous comment which highlighted those aspects of the passage "negative" to the plaintiff. This interjection provided Dr. Spencer, a hostile witness, an opportunity to inject additional negative comments about the plaintiff:

> Q (Mr. Sykes): In the report that you wrote, didn't you say ... [various things quoted]?
> A (Dr. Spencer): That's right.
> THE COURT: So aside from the hysterical feature that you think you noted, the inconsistency in sitting posture, and the sensory examination in performance of the straight-leg examination, everything was the same?
> THE WITNESS: Well, no. He was describing some weird features of loss of memory and general weakness and various tingling sensations, which hadn't been there before. And also neck pain, which also hadn't been there before. (Emphasis added)

(T. I-45-46; App. 3).

On another occasion, Mr. Onyeabor challenged Dr. Robert Cook, a defense psychologist who practices in Denver, on the

issue of proper test conditions at an I.M.E. Dr. Cook had administered sensitive psychological tests to Mr. Onyeabor at the law offices of William Stegall, the defense attorney, to whom Mr. Onyeabor was hostile. Mr. Onyeabor desired to impeach Dr. Cook's procedure and set the stage for this by asking Dr. Cook:

> Q (Mr. Sykes): All right. The conference room, however, is right next to the reception area [?]. It is enclosed by glass, and you can watch people walk by, can't you?
> A (Dr. Cook): Yes.
> Q: And you can hear the phone ring, can't you?
> A: Yes.
> (Emphasis added)

(T. K-194). Mr. Onyeabor's counsel later questioned Dr. Linda Gummow, a neuropsychologist, in rebuttal about how this hostile test environment could impact the test results. Counsel asked if it was proper to administer psychological tests in a conference room "that had a glass wall and then it (sic) was a few feet away from the reception area." (Emphasis added) (T. M-29:13). In response to an objection, the court again sided with the defense and made this comment on the evidence: "I don't think he [Dr. Cook] said that and don't you put your view as to the distance." (Emphasis added) (App. 4). This was an assessment of the evidence -- and an erroneous one at that -- as to how Dr. Cook had testified. The memory of the testimony and its evaluation was the province of the jury.

One of the most serious comments on the evidence concerned the exhibit notebooks, which were provided for the jurors. Judge Dee had ordered that Onyeabor's counsel could

prepare looseleaf notebooks containing the documentary evidence on which there would be no objection. The attorneys had agreed in advance of trial as to which exhibits would be placed in the notebooks. Plaintiff attempted to make frequent use of the exhibit notebooks from the outset, asking the jury to refer to certain documents that counsel deemed significant for his client. On five occasions during the first three days of trial, the court made disparaging or negative comments about the use of the notebooks (App. 6). Finally, the following exchange occurred which was not only tremendously embarrassing to Mr. Onyeabor's counsel, but very damaging to his strategy of having the jury evaluate certain documents:

> MR. SYKES: May we have the jury turn to that, Your Honor, to 55?
> JUDGE CROFT: Why don't you ask him the question and I think the jury can get it easier from what the doctor says than they can trying to read what the book says. And all of you follow what the doctor is saying at the same time.
> MR. SYKES: Your Honor, the only reason I do that, I think it would be helpful to see and hear at the same time.
> JUDGE CROFT: Okay. Let's have an understanding that any time the jury wants to pick up the book to look at the exhibit that the witness is talking about you are free to do so, if you don't want to you don't have to.
> MR. SYKES: Okay. I think it would be helpful in this case, Your Honor.
> JUDGE CROFT: I'm going to let them make the decision because they may not find it that way. (Emphasis added)

(T. D-443-444; App. 6). These interjections by the court on the use of the exhibit notebooks amounted to a comment that the documentary evidence in the case was not as important as the oral

evidence. It also amounted to a negative comment on counsel's methods in presenting the case. Both comments were very prejudicial.

There simply is not room to fully discuss every one of the court's direct comments on the weight of the evidence, so they are cataloged in Table I above. To summarize, the court commented that Dr. Linda Gummow was not qualified to render an opinion as to whether or not Mr. Onyeabor lost consciousness at the scene of the accident because she was not present (App. 5); that Dr. Gummow was subject to some discredit because she used learned treatises to rebut a prior witness's testimony (App. 7); that the judge doubted whether Mr. Onyeabor's vehicle struck the center median at the time of the accident, causing him to be jostled and to strike his head (App. 8); that an investigating officer's experience did not justify his opinion as to whether Mr. Onyeabor probably struck his head (App. 9); that certain medical terms were too complex for even a medical doctor's understanding, so the jury would not comprehend them either (App. 10); as well as other important matters (Apps. 11-14). These comments on the evidence severely prejudiced Mr. Onyeabor.

- Prejudicial Interjections And Interruptions -

The judge frequently commented on the evidence in the form of sua sponte interjections and interruptions (see Table II). Some of these were substantively quite serious, while others amounted to witness intimidation. They had the general effect of casting doubt upon some aspect of Mr. Onyeabor's case.

One example occurred while counsel was questioning Dr. Richard Nielsen, a prominent otolaryngologist, about Mr.

TABLE II

INTERJECTIONS AND INTERRUPTIONS (SUA SPONTE)* BY TRIAL COURT

Very Serious Interruptions †

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Interjection or Interruption
15.	3 - 2/04	Richard Nielsen M.D. (P)	D 460	Judge invites opposition to object to expert's qualifications; casts doubt upon expert's qualifications.
16.	6 - 2/09	Mark Zelig, Ph.D. (P)	G 95-96	Judge interjects comment to help defense; scolds plaintiff's expert witness; one of few instances in trial where judge interjected during defense examination.
17.	8 - 2/11	Alan Heal (P)	J 187	Judge interjects to help defense; questions plaintiff's expert on basis of opinion.
18.	6 - 2/09	Mark Zelig, Ph.D. (P)	G 66-67	Judge interjects and tells jury that the doctor is "broadening his answer ... too much."
19.	9 - 2/12	Boyd Fjeldsted (P)	K 9	Rude interjection which implies that plaintiff's counsel has suggested an answer.
20.	8 - 2/11	Alan Heal (P)	J 196	Rude and unnecessary interjection which suggests that plaintiff's expert has not answered a question posed by defense counsel.
21.	8 - 2/11	David Nilsson Ph.D. (P)	J 63	Rude interruption during plaintiff's examination of expert suggesting that expert has exceeded his expertise.
22.	3 - 2/04	Gerald Moress, M.D. (P)	D 422	Interjects to question expert witness about where plaintiff hit his head.
23.	9 - 2/12	Robert Cook, Ph.D. (D)	K 209	Court interjects to help defense witness on re-cross as to what was said earlier.
			Serious Interruptions	
24.	4 - 2/05	Richard Goka, M.D. (P)	E 497	Questions plaintiff's expert as to whether he understands certain head injury terms from a glossary.

* Raised by the court without defense counsel objections.

† Other serious interjections are cataloged in Table I, Tab Nos. 3, 5, 6, and 11.

TABLE II CONTINUED

App. No.	Day of Trial/Date	Witness Name/ Called By	Transcript Vol./Page	Substance and Effect of Interjection or Interruption
25.	8 - 2/11	David Nilsson, Ph.D. (P)	J 38	Questions plaintiff's expert about something that "troubled me" regarding scope of jury's decision to decide the case.
26.	5 - 2/06	Duncan Wallace, M.D. (P)	F 744-5	Judge interjects to unnecessarily restrict plaintiff's re-direct examination on expert witness's own drop in IQ after expert's gas poisoning head injury; defense counsel had earlier raised the issue of expert's own injury on cross-examination to impeach expert's objectivity.
27.	8 - 2/11	David Nilsson, Ph.D. (P)	J 9	Interjects in attempt to narrow scope of answer by plaintiff's expert.
28.	6 - 2/09	Mark Zelig, Ph.D. (P)	G 91	Interrupts to help defense counsel's examination on issue of grades.
29.	11 - 2/17	Emmanuel Onyeabor (P)	M 6	Interrupts plaintiff's answer to important question.
30.	3 - 2/04	Richard Goka, M.D. (P)	D 474	Interjects to try to narrow scope of witness's expertise.
				Unnecessary and Disruptive Interjections
31.	7 - 2/10	Emmanuel Onyeabor (P)	I 103	Price of left-front tire repair offered to show that plaintiff did in fact hit the median strip and was severely jostled; witness hassled by judge.
32.	3 - 2/04	Stevens Pedersen (P)	D 311-12	Didn't want plaintiff's father-in-law to testify about the fact that he was hard of hearing; offered to lay foundation that plaintiff's wife would notice hearing problems in plaintiff caused by the accident.
33.	3 - 2/04	Richard Goka, M.D. (P)	D 476-7	Interrupted to get evidence admitted before plaintiff's counsel had finished laying foundation.
34.	3 - 2/04	Richard Nielson M.D. (P)	D 456	Unnecessary scolding of counsel on evidentary matter.
35.	Many/ Various	Patrick Chukwu Mr. Onyeabor Pamela Walker, MA Stevens Pedersen Richard Goka, M.D. Linda Gummow, Ph.D. Mark Zelig, Ph.D. (P)	Many	Many rude, unnecessary, annoying interruptions and interjections that amounted to witness intimidation.

Onyeabor's neurosensory hearing loss. Dr. Nielsen was asked as to the percentage of permanent partial impairment resulting from that aspect of the injuries. He responded that there was a one to two percent impairment, at which point Judge Croft interjected sua sponte with the following:

> Q (Mr. Sykes): One or two percent [referring to permanent hearing impairment]?
> A (Dr. Nielsen): Yes, that's -- I feel that's rather an artificial way to measure hearing loss, but that's the way it's commonly used in disability.
> JUDGE CROFT: I assume, Mr. Stegall, you are not objecting to lack of qualification testimony?
> MR. STEGALL: Your Honor, I understand the gentleman is an ENT specialist and --
> JUDGE CROFT: You stipulate he is an expert in that field?
> MR. STEGALL: In the field.
> JUDGE CROFT: And can testify without further foundation? (Emphasis added)

(T. D-460:9-17; App. 15). A juror could not fail to miss the fact that the judge was attacking the credibility of Dr. Nielsen's testimony by questioning his qualifications as an expert.

The court frequently interjected comments during the questioning of plaintiff's experts which inferred that the expert did not answer the question fully (Apps. 16, 17, 18, 20, and 21). The effect of these comments certainly gave the jury the impression that the expert was being less than candid. Another impact of the sua sponte interruptions (Apps. 15-23) was to suggest that Mr. Onyeabor's experts either did not answer questions substantively, or had said too much and needed to be interrupted. Every such instance related to something of

substance about the case, such as whether Mr. Onyeabor struck his head (App. 22); to what extent it is appropriate to rely on experts from different fields (App. 20); or how a discount rate is derived (App. 19).

There were additionally seven other serious interruptions (Apps. 24-30). For example, the court questioned whether or not Dr. Goka understood certain medical terms (App. 24); the court indicated that it was "troubled" by something that it thought Dr. Nielsen said (App. 25); and the court emphasized particular negative points brought up in the testimony (App. 9). The net impact of this series of interjections was to impute weakness to certain evidence presented by Mr. Onyeabor (see Table II for a summary).

Lastly, the court simply interrupted witnesses time and time again, making it difficult to examine and cross-examine them, and in effect harassing them (App. 31-35). These actions by the judge were unnecessary and intimidating to the witnesses. The court in Egede-Nissen, supra, noted that judicial interruptions can suggest lack of judicial confidence in the integrity of witnesses:

> The court, of course, may question witnesses. However, the court's questions may not be phrased in a manner indicative of the court's attitude toward the merits of the cause, thus constituting an impermissible comment on the evidence.

Id. at 1222. These repeated interjections by the court certainly must have indicated to the jurors the court's feelings on the merits.

The Court generally interfered with counsel's cross-examination, which severely disrupted Mr. Onyeabor's presentation of the case. In addition to the examples discussed above, the following are relevant:

The court refused to allow counsel to write down on the board what a defense witness had ignored in forming his opinion (T. K-54-5); interfered with the cross-examination of a defense psychologist by the use of a chart (T. K-116-117); refused to allow counsel to write down on the board a score used in a test that Mr. Onyeabor had taken with that psychologist (T. K-167-8); interrupted counsel in the middle of a question and before the answer (T. L-46); interjected harshly in the examination of Mr. Onyeabor's psychologist with respect to an exhibit the court thought had not been admitted (T. N-12) which should have been admitted (T. K-153); and interfered with the drawing of a diagram during the psychologist's rebuttal testimony (T. N-14).

A court has wide discretion in controlling the conduct of a trial. However, unnecessarily harsh treatment of counsel constitutes a comment on the evidence. Messler v. Simmons Gun Specialists, Inc., 687 P.2d 121 (Okla. 1984). The Court noted:

> However, as long as counsel is not unduly restricted, his knowledge challenged, or his motives impugned, the court may direct counsel to refrain from delay and may comment on a waste of time.

Id. at 129. Thus, even if some of the interjections made by the court could be deemed to be made in the interests of conserving time, the manner in which they were done certainly impugned the motives and knowledge of Onyeabor's counsel in such a way as to reflect prejudicially upon his case.

- Arguments In Front Of The Jury -

The court permitted extensive arguments as to evidence in front of the jury. This amounted to a comment on the evidence because it indicated that the court believed plaintiff's evidence to be weak or unconvincing.

Normally, such argumentation and disputes about evidence would have occurred outside the presence of the jury, at least in a side bar conference. However, the court refused all three of Mr. Onyeabor's requests to approach the bench (T. B-46, C-76, I-103). This effectively intimidated counsel from making further requests to approach the bench. The only time that the court allowed counsel to approach the bench was when defense counsel, Mr. Stegall, asked permission (T. L-190).

As a result of the refusal of the court to allow counsel to approach the bench, counsel conducted frequent and lengthy interchanges with the court on the admissibility of evidence in front of the jury. Defense counsel frequently interjected prejudicial information. This constituted a comment on the evidence because the court allowed it to happen. For example, the judge frequently allowed argument over the proper use of learned treatises (T. E-560-564; F-842; H-20-23; M-32-36; and M-49-54). The court allowed argumentation on the admissibility of certain exhibits, including Exhibit 112, a film regarding head injury in general (T. E-498-499); Exhibit 11, a photo album (T. G-137); and the admissibility of evidence on medical bills (T. J-140-142).

The court allowed argumentation about other important evidentiary points such as the viability of Dr. Gummow's disability evaluation (T. F-856-857); whether or not Liz Onyeabor would be allowed to testify on the issue of Mr. Onyeabor's grades and why he took certain classes twice (T. J-132-135); whether Liz Onyeabor would be allowed to testify as to what Mr. Onyeabor's employment and school plans were for the future if there had been no accident (T. J-143); and what rate the economist Boyd Fjeldsted should be allowed to use in figuring Mr. Onyeabor's loss of future earning capacity (T. K-18-22).

This argumentation was harmful to Mr. Onyeabor's case because the judge invariably ended the dispute by ruling against Mr. Onyeabor's position. However, there were no other options open. Counsel could not approach the bench, and the only other avenue was to let the erroneous rulings slide by without any attempt to correct them. The overall impact of the court's refusal to allow counsel to approach the bench and permitting extensive argumentation in front of the jury was to prejudice Mr. Onyeabor's case because of comments on the evidence.

- <u>The Demeanor Of The Court Prejudiced The Jury</u> -

The trial judge exhibited harshness and a hostile demeanor toward the plaintiff's case and counsel throughout the trial. This prejudicial demeanor was very significant, but does not display well in the printed record because it included facial expressions, tone of voice, sighs and body language. Therefore, counsel has procured affidavits from some of the doctors and other witnesses who were present at the trial and who witnessed

these events. Such allegations are properly shown by affidavit. Egede-Nissen, supra at 1222. These affidavits are contained in Appendices 36-39.

The court was particularly harsh with plaintiff's counsel during the first three days of trial, frowning frequently, sighing and demonstrating by "body language" that the court did not think much of Mr. Onyeabor's case or his counsel (Apps. 36, 37, 38, and 39). For example, Dr. Brian Burns, a chiropractor who has testified over 30 times, stated that he had never seen "even one judge be so discourteous ... or hostile towards the plaintiff's counsel." (App. 37). Dr. Linda Gummow, a neuropsychologist who treated Mr. Onyeabor, stated in her affidavit that not only did the judge's tone of voice, facial expressions, frowning, and general attitude demonstrate a definite bias against the plaintiff, but that his comments demonstrated a definite hostility toward her personally (App. 36). Robert Jinks, an experienced trial attorney in California and Hawaii, noted "facial expressions of disgust and dissatisfaction, including grunts and sighs that were related to plaintiff's evidence of expert witnesses and exhibits" (App. 38). Mr. Jinks noted that he had never seen a case "where the judge was so obviously and blatantly biased against one party" (App. 38, ¶3). Kay Nebeker made similar, articulate comments about the court's obvious bias (App. 39).

When overruling Mr. Onyeabor's objections, the court used a very harsh and gruff voice. He appeared to lack patience with everything requested by plaintiff's counsel. A good example

of this, which does appear in the record in part, can be seen in the incident having to do with the exhibit notebooks provided to the jurors (see discussion above; see also App. 6; T. D-443-444). When Mr. Onyeabor's counsel tried to use the notebooks, the court gave noticeable shrugs of the shoulders and "snapped" at counsel, making comments about what he obviously regarded as a laborious process (T. D-325, 333, 348, and 382).

Mr. Onyeabor's counsel did object to the judge's comments on the evidence in front of the jury after the third day of trial, although it will not appear directly in the record. At the end of the third day of trial, counsel met with the court in chambers, and "had it out" on the issues described above. The reporter had gone home, so it won't be found on the record; however, there are indications in the record, as well as an admission by the court, that the incident did occur. See the reference to this issue in plaintiff's Memorandum in Support of Motion for a New Trial (R. 694-695), and the court's acknowledgment of the incident in the course of its ruling on the Motion for a New Trial (T. P-87:18).

The meeting between counsel and the court referred to in the record lasted approximately 30 to 40 minutes, was quite animated and covered the comments on the evidence extensively. The conference occurred on the evening of the third day of trial, February 4, 1987. The next day, Thursday, February 5, 1987, was better. The court indicated that the jurors could now look at the notebooks if requested by counsel (App. 6, last page; T. E-491). However, the comments on the evidence and interjections

into the record continued relatively unabated, even increasing the second week of trial.

Obviously, Mr. Onyeabor's counsel was reluctant to object every time the court commented on the evidence. It would have resulted in a spate of continuous objections, as can be seen from Tables I and II. The Egede-Nissen court said:

> While the report of proceedings does not reflect contemporaneous objections to such conduct [i.e., the judge's "body language" indicating disbelief during the testimony], concurrent objection is not required. Understandably, counsel may be reluctant to note such an objection, particularly in the presence of the jury, and may elect not to object at all if the incidents were only occasional and minor. If, however, the occurrences were ... frequent and marked ... counsel should object to the court's conduct. (Emphasis added)

Id. at 1223. It would simply have been futile to have continued objecting.

- Cumulative Effect Of Comments -

The comments on the evidence and interjections into the record in this case were many, varied and pervasive. Although some of the errors and comments were very serious, many would not have been grounds for reversal standing alone. Viewed from a cumulative perspective, however, these errors were devastating. The Egede-Nissen court said:

> A trial judge should not enter into the "fray of combat" nor assume the role of counsel. An isolated instance of such conduct may be deemed harmless error, however, if it cannot be said to violate constitutional bounds of judicial comment. ... On the other hand, the cumulative effect of repeated interjections by the court may constitute reversible error. In the instant case, we believe the trial court, perhaps inadvertently without meaning

> to do so, actively interceded in the trial more frequently and at greater length than the circumstances warranted ... . (Emphasis added)

Id. at 1223. The judge in Onyeabor actively interceded far more than he needed to, even if some of the instances may have been justified.

The effect on the jury of the judge's actions should not be underestimated. One court characterized it in this manner:

> Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that the jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard-fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of a trial, lead to great prejudice. (Emphasis added)

State v. Jackson, 145 P. 470 (Wash. 1915), quoted with approval in Risley v. Moberg, 419 P.2d 151 (Wash. 1966). In the hard-fought case pressed by Mr. Onyeabor in the lower court, the cumulative effect of the comments on the evidence and judicial interjections was devastating to Mr. Onyeabor's chances of receiving a fair trial. He did not receive a fair trial.

POINT II.

Dr. Clark - A Surprise Witness

ALLOWING DR. LINCOLN CLARK, A DEFENSE PSYCHIATRIST, TO TESTIFY AT TRIAL WAS PREJUDICIAL SURPRISE BECAUSE HE WAS NOT NOTICED AS A WITNESS UNTIL SIX BUSINESS DAYS BEFORE TRIAL, THE PLAINTIFF WAS NOT FURNISHED A COPY OF HIS REPORT UNTIL THE THIRD DAY OF TRIAL AND THE REPORT WAS INCOMPLETE.

STANDARD OF REVIEW AND APPLICABLE RULES OF LAW

Rule 26(e)(1) Utah Rules of Civil Procedure provides as follows:

> A party is under a duty seasonably to supplement his response with respect to any question directly addressed to ... the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. (Emphasis added)

Rule 51(a)(3) provides that a new trial may be granted on the basis of "accident or surprise, which ordinary prudence could not have guarded against."

A defendant's calling of a medical doctor to testify about the cause of a plaintiff's injury does not constitute surprise where the plaintiff has notice of the specific witness and subject matter of the testimony. Jensen v. Thomas, 570 P.2d 695 (Utah 1977) (where an earlier answer to an interrogatory by defendant had stated the substance of a specific doctor's testimony about a certain disease). However, the court should

exclude a defense medical expert where the name and/or subject matter of the testimony is not disclosed in a timely manner. Acosta v. Superior Court, 706 P.2d 763 (Ariz. App. 1985); Hadid v. Alexander, 462 A.2d 1216 (Md. App. 1983); Lodrigue v. Houma-Terrebonne Airport Com'n, 450 So.2d 1004 (La. App. 1984); and Sturdivant v. Yale-New Haven Hosp., 476 A.2d 1074 (Conn. App. 1984). Exclusion of the witness is further justified where no report or a late report is prepared, or where the report does not disclose important information. Otherwise, cross-examination is hindered. Hoover v. U.S. Dept. of Interior, 611 F.2d 1132 (5th Cir. 1980); Sirianni v. General Motors Corp., 325 F.Supp. 509 (W.D. Pa. 1971); DeMarines v. KLM Royal Dutch Airlines, 433 F.Supp. 1047 (E.D. Pa. 1977).

The trial court abuses its discretion if it denies a Rule 59(a)(3) motion for a new trial where there is a surprise "which ordinary prudence could not have guarded against." Jensen, supra; see also Anderson v. Bradley, 590 P.2d 339, 341 (Utah 1979). The surprise contemplated by Rule 59(a) must result from some adverse circumstance or situation in which a party is placed unexpectedly to his injury, and without any fault or negligence of his own. Havas v. Haupt, 583 P.2d 1094, 1095 (Nev. 1978).

ARGUMENT

- Introduction -

The facts regarding Dr. Clark's reappearance in this case are egregious. As of December 5, 1986, Dr. Clark was

unequivocally out of the case, claiming Mr. Onyeabor was frightening to him, and stating "I have already expressed I want out of this. I mean I made that very clear at the beginning." (Emphasis added) (T. S-18). He stated, "I'm not going to change my mind" (Emphasis added) (T. S-19). Dr. Clark's withdrawal from the case was the reason for continuing the trial from December 8, 1986, to February 2, 1987. No amount of "ordinary prudence" could have warned Mr. Onyeabor's counsel that Dr. Clark would reappear under these circumstances.

The defendants had a continuing duty to supplement their responses to interrogatories wherein the names of all witnesses were requested. Rule 26(e)(1), Utah Rules of Civil Procedure. Plaintiff asked for the names of all witnesses in the interrogatories answered on July 21, 1986 (App. 44). The notice of Dr. Clark as a witness, after his "final" withdrawal on December 5, 1986, came by way of the defense supplementary witness list served by mail on January 21, 1987 (R. 308). On January 30, 1987, Plaintiff made a timely Motion in Limine to prohibit Dr. Clark from testifying, which was denied by the court (R. 326; T. Q-54).

- Prejudice To Mr. Onyeabor -

The court committed reversible error in not excluding Dr. Clark's testimony. His disclosure as a witness was not made known to Mr. Onyeabor until six business days prior to trial, and there was simply not time enough, given the exigency of preparation for a major trial and the unavailability of defense counsel, to take Dr. Clark's deposition (see Statement of Facts

above). It should be noted that counsel operated throughout this entire case under an agreement of open discovery, i.e., depositions of all experts on both sides. There were 10 to 15 depositions of expert witnesses conducted by the parties. Had there been time and meaningful opportunity, Mr. Onyeabor would have taken Dr. Clark's deposition.

Almost all courts refuse to allow last minute experts to testify, under circumstances similar to those in Onyeabor. In Lodrigue v. Houma-Terrebonne Airport Com'n, supra, the defendants in a personal injury suit had submitted an interrogatory to the plaintiff asking for the names of any expert witnesses that plaintiff intended to call. A trial was scheduled for September 16, 1982, and the plaintiff supplemented his responses on September 7, 1982, nine days before trial, submitting the name of an expert witness and then was uncooperative to defendant's request to depose the witness prior to trial. The appellate court in Lodrigue noted Louisiana's equivalent to Utah Rule 26(e)(1) which required a party to "seasonably" supplement responses to interrogatories. The trial court refused to allow the witness to testify and was upheld on appeal because the defendants were prejudiced in their discovery efforts. Id. at 1007.

The policy reasons for forbidding a last minute expert to testify where the untimeliness of notice is unexplained are well set out in the case of Acosta v. Superior Court, supra, which has amazing parallels to Onyeabor. In Acosta, the plaintiff was a petitioner in a wrongful death malpractice action

scheduled for trial on September 4, 1985. The real party in interest was an anesthesiologist. The defense list of witnesses did not include a certain doctor. Two days after the deadline for filing notice of witnesses, and 18 days prior to the trial date, defense counsel apparently received a letter from a doctor containing his opinion as to the cause of death. The defense counsel notified the plaintiff's counsel that the doctor would be a witness but did not furnish a report until 13 days later, or five days before trial. The witness in question was unavailable for deposition until trial. The trial judge indicated his intention to allow the witness to testify, and the plaintiff brought a special action appealing the trial court's refusal to strike the expert witness. The appellate court held that the trial court had abused its discretion, and vacated the order allowing testimony by the witness. The appellate court stated that preclusion of a witness:

> ... should only be invoked where there is both absence of good cause for the untimeliness and prejudice to the opposing party. Both conditions are met on the facts of this case. Counsel for the [defendants] has suggested no reason for the late revelation of the witness save failure of his clients to discover him until the eve of trial. This is not good cause; dilatoriness never is. Beyond this, no reason was advanced for withholding the content of the witness' testimony for an additional two weeks. (Emphasis added).

Id. at 764. The Court noted the prejudice that would result to the plaintiff, who had obtained a special visa to come to testify from Mexico. The Court observed that if the trial date were

changed to permit additional discovery, that effort on the part of the plaintiff would be lost. There was additional prejudice:

> [A] fixed trial date is a valuable asset. Once lost, substantial delay of up to a year could result. Finally, there is prejudice to the administration of justice where trials are delayed; courts cannot effectively function if their calendars are subject to the control of dilatory parties.

Id. at 765.

In the Onyeabor case, a fourth continuance of the trial was not possible due to the precarious condition of Mr. Onyeabor's mental health. At the November 10, 1986, hearing on the third defense Motion for Continuance (of the November 17th trial date), Linda Gummow, Mr. Onyeabor's treating psychologist, testified in opposition to a continuance. She had previously filed a report detailing the harm that Mr. Onyeabor had suffered as a result of the previous continuance (R. 200). She indicated that Mr. Onyeabor's psychological condition had deteriorated considerably because of previous continuances (T. R-10-11). Dr. Duncan Wallace, Mr. Onyeabor's psychiatrist, also told a frightening story of Mr. Onyeabor's serious loss of emotional control resulting from the November continuance (T. E-699-702). Mr. Onyeabor was simply "on the edge" mentally and emotionally, and a number of people thought he would be a danger to himself and others (R. 201) if yet a fourth continuance were to be granted (T. S-2-3).

- No Explanation of Untimeliness -

The defendants never presented any reasonable explanation as to the untimeliness of their notification of Dr.

Clark's reappearance or their failure to present a timely written report to the plaintiff as required by Rule 35, U.R.C.P., until the third day of trial. At the hearing on the Motion in Limine, Mr. Stegall merely indicated the following:

> In the first part of January Dr. Clark contacted me and indicated that he was concerned about being out of the case. ... For that reason I have shown him as a witness. (Emphasis added)

(T. Q-38-39). If Mr. Stegall was aware of Dr. Clark's reappearance in the "first part of January", why wasn't counsel notified until January 21st? Furthermore, why did he wait until February 4th, the third day of trial, to provide a written report (App. 41) as required by Rules 35 and 26(e)(1), U.R.C.P.? There has been no explanation of either delay.

The failure to provide notice of Dr. Clark is puzzling. First of all, Dr. Clark's own testimony was suspicious. He was asked directly and pointedly when he decided to re-enter the case and he simply evaded the question, finally giving a vague answer:

> Q (Mr. Sykes): When did you do that [offer to re-enter the case]?
> A (Dr. Clark): I have forgotten the exact date when that occurred?
> Q. Early in January, late in December?
> A. I think that Mr. Stegall would have to answer that.
> Q. I am asking you.
> A. I do not have a record of that, when it was exactly.
> Q. Well do you -- it has only been two months. Do you recall approximately, was it before or after Christmas?
> A. Well, I think it was after Christmas, but I am not certain of that. (Emphasis added)

(T. L-127-128).

There was plenty of opportunity to provide notice of Dr. Clark's re-entry as an expert witness. Both counsel were in frequent telephone contact during December, 1986, and January of 1987. There are at least three separate pieces of written correspondence from Mr. Stegall to Mr. Sykes during that period (App. 40); yet, on none of these occasions was counsel made aware that Dr. Clark had re-entered the case, allegedly in "early January." All of the correspondence, as well as oral conversations with counsel up until that time, indicated that Dr. Cook of Denver was the only contemplated defense expert witness (App. 40), and trial preparation was done accordingly.

- Failure To Provide A Timely, Complete Report -

In Sirianni v. General Motors Corp., supra, the trial judge excluded the testimony of a physician where the plaintiff presented no pre-trial report to the defense. The court regarded the testimony of the doctor as that of a "new medical witness" even though the doctor had treated the plaintiff three years prior to the trial. The Court held:

> The exclusion of such testimony without a prior report is a well-standing practice in this court under our pre-trial rules in support of a strong policy against the introduction of surprise testimony of expert opinion witnesses.

Id. at 511

The failure to produce a report from Dr. Clark until the third day of trial was highly prejudicial. The report was seven single-spaced pages (App. 41), and was handed to Mr.

Onyeabor's counsel on the morning of February 4th, the third day of trial. Later that same day, Mr. Onyeabor began calling his expert witnesses on the head injury issue (Drs. Moress, Nielsen and Goka -- see Vol. D of transcript), and had called virtually all of these witnesses by the close of trial on Friday, February 6th. Thus, none of plaintiff's witnesses really had an opportunity to read and assess Dr. Clark's report prior to the time they testified. Counsel did not have time to analyze the report and discuss it with his experts, because of the hectic nature of daily trial preparation in a major case.

Dr. Clark's late report presented an additional significant problem. It did not state a conclusion as to what was wrong with Mr. Onyeabor (App. 41:7). It indicated that his native abilities were more limited than those of his siblings, but that he was "... a man of average general ability" who simply needed to redirect his career goals (App. 41:7). There was simply no adverse diagnosis or clue as to what his opinion really was on several important issues having to do with brain injury. However, on cross-examination it turned out that Dr. Clark did not believe that there could be a closed-head organic brain injury in someone like Mr. Onyeabor unless there was loss of consciousness, retrograde amnesia and positive findings on tests such as the CT scan, the EEG, etc. (T. L-180:5, 24; 184:1-3; 185-6). Therefore, counsel was compelled to hastily cross-examine Dr. Clark on these issues based upon reference to learned texts (T. L-172-192). The doctor refused to acknowledge many of the texts and the authors as authoritative (T. L-175:14), so the

cross-examination was not as effective as it could have been had counsel been able to learn the doctor's opinions in a prior deposition and what texts he regarded as authoritative.

One of the most damaging aspects of Dr. Clark's testimony was the diagnosis that Dr. Clark gave of Mr. Onyeabor for the first time on cross-examination. Dr. Clark was questioned by plaintiff's counsel as to why there had been no diagnosis in the report. At that point, Dr. Clark diagnosed Mr. Onyeabor's problems as a pre-existing personality disorder. He stated:

> I could do that readily. I think it is self-evident in terms of it being a personality disorder with histrionic features, and also explosive features as well. And his hysteroid, it is a personality disorder, other mixed type with histrionic, and I agree, an explosive feature as well. (Emphasis added) (Note: The actual testimony was far more lucid; this passage reflects some confusion by the reporter.)

(T. L-192:15). Since the doctor brought that up, counsel was forced to cross-examine on the issue (T. L-193-199). This gave Dr. Clark an additional opportunity to expound on Mr. Onyeabor's allegedly pre-existing personality disorder (T. L-193-4). This would not have happened had Mr. Onyeabor's counsel had the prior opportunity to learn the details of Dr. Clark's opinion in a complete report.

Counsel's "rock and a hard place" situation in this case is exactly what the rules of discovery were designed to prevent. Counsel was placed in the unenviable position of having to either request a continuance and risk further damage to the

client; take time out in the middle of a trial and try to prepare a deposition of Dr. Clark at great disadvantage because of timing and a very late report; or proceed with the trial examination and do the best one could with the limited information available.

A continuance was out of the question because of the client's mental health (see discussion above). A mid-trial deposition of a difficult, hostile expert witness was was impractical. It would have required significant preparation and concentration to take a meaningful deposition of this particular witness at this time. To conduct a major trial requires all of the energies of an attorney while in attendance at court during the day, and in evaluation and preparation at night. There is no time left for the arduous task of preparing for and taking the deposition of a difficult expert witness. Dr. Clark is a well-known, oft-used "defense psychiatrist" who has been asked to be a witness by defense counsel many times during the past several years (T. L-115:17-21; 115-116). The way that Dr. Clark answered -- or didn't answer -- the question of how many times he had been a witness (T. L-116-118) is evidence of his skill as a "a street-wise" defense witness.

If Dr. Clark had been a simple fact witness, the situation would have been different. A mid-trial deposition would have been simple. However, in the context of an emotionally draining, time-consuming, 18-hour-a-day case such as this, the possibility of taking a major deposition of an important expert was an impossible task. Counsel therefore was required to pursue the course of the lesser evil, that of

cross-examining Dr. Clark on the witness stand and hoping for the best.

Courts generally refused to allow surprise experts to testify in similar situations. For example, in Hoover v. U.S. Dept. of Interior, supra, the Court held that an opposing party is entitled to discover the substance of the facts and the opinions of the expected testimony. "The primary purpose of this required disclosure is to permit the opposing party to prepare an effective cross-examination." (Emphasis added) Id. at 1142. An "effective cross-examination" is precisely what was denied plaintiff with respect to Dr. Clark. In the case of DeMarines v. KLM Royal Dutch Airlines, supra, the defendant in an airline decompression case called a doctor of whom no prior notice was given, to testify that the plaintiff's condition resulted from pre-existing causes (similar to Dr. Clark's testimony in this case). The plaintiff's counsel objected to this improper testimony on the grounds that the report furnished to him by the doctor did not contain any such diagnosis. The trial judge excluded the testimony ruling:

> I am not going to permit that testimony if there is not something [about the problem] in this report because, frankly, the very reason for handing over reports is so that both sides will be aware of what is going on and not be sprung any surprises. (Emphasis added)

Id. at 1058. The Court also noted the importance that all parties be informed "before trial as to the substance of the other party's expert testimony in order that he may be prepared to meet this testimony and will not be surprised by it." Id. at

1059. The appellate court, therefore, found no prejudicial error in excluding the doctor's testimony. Accord, Hadid v. Alexander, supra; Sturdivant v. Yale-New Haven Hosp., supra (the Court correctly refused to allow a party's medical expert to testify where the party had claimed that although the medical expert had been informally consulted previously, he had not been formally retained until the day after the jury selection began; the Court characterized this conduct as "tactical subterfuge," which justified the sanction).

Hopefully Mrs. Bates will finally provide an explanation in her brief as to why notice of Dr. Clark and a report were not provided sooner. Regardless of the reason, however, the prejudice to Mr. Onyeabor is undeniable, and warrants reversal and remand for a new trial.

POINT III.

Erroneous Evidentiary Rulings

THE COURT WRONGFULLY EXCLUDED IMPORTANT EVIDENCE WHICH AFFECTED THE OUTCOME OF THE CASE.

STANDARD OF REVIEW
AND
APPLICABLE RULES OF LAW

The admission of legally inadmissible evidence is error and presumed prejudicial. Boy v. I.T.T. Grinnell Corp., 724 P.2d 612, 618 (Ariz.App. 1986). The erroneous exclusion of evidence is grounds for reversal if it appears that the excluded evidence would have had a substantial influence in bringing about a different verdict or finding. Hill v. Hartog, 658 P.2d 1206 (Utah 1983). A stricter standard of review is justified when the erroneous rulings on evidence occurred in a jury trial. Arnovitz v. Tella, 27 Utah 2d 261, 495 P.2d 310 (1972). If the error is substantial enough that it is reasonable to believe that it adversely affected the appellant or deprived him of a fair trial, and in the absence of the error there is a reasonable likelihood that the outcome would have been different, reversal is warranted. Del Porto v. Nicolo, supra; Matter of Kessler, supra.

The improper exclusion of an expert in accident reconstruction as to any relevant matter within the scope of that expert's knowledge, justifies the granting of a new trial. Reeves v. Markle, 579 P.2d 1382 (Ariz. 1978). An expert witness may be cross-examined regarding a medical textbook. A medical

treatise can also be used on direct and re-direct examination. Purcell v. Zimbelman, 500 P.2d 335 (Ariz.App. 1972). Failure to allow a proper rebuttal witness is prejudicial error. Hall v. Hall, 708 P.2d 416 (Wyo. 1985).

Prejudicial error should be presumed when admissible evidence is excluded. Dawson v. Associates Financial Service Co. of Kansas, Inc., 529 P.2d 104 (Kan. 1974).

ARGUMENT

The court wrongfully excluded a great deal of important evidence offered by plaintiff. A few of the most important points will be discussed at some length; the balance are referred to in summary fashion.

A. Exhibit 114, video tape of crash. The court excluded plaintiff's Exhibit 114, a video tape of a dummy in a car striking a wall at 5 mph and 21 mph (T. C-146). Plaintiff had laid the foundation for this exhibit through Dennis Andrews, a former highway patrolman and an accident reconstruction expert with Rudi Limpert's firm (T. C-122-128). Mr. Andrews testified that Mr. Onyeabor's vehicle was going approximately 35 mph at impact (T. C-105-106) whereas the Bates' vehicle was going approximately 5 mph in a northerly direction at impact (T. C-108). Mr. Andrews then explained the principles of relative motion that apply to bodies in a car at the time of a sudden, deceleration accident. Mr. Andrews testified that the exhibit illustrated this principle, despite the fact that it dealt with a wall crash

rather than two vehicles in motion, because the principle illustrated in both cases was sudden deceleration (T. C-125-126). Mr. Andrews indicated that whether someone hit a wall, or another significantly slower moving object, the principle of sudden deceleration and what it would do to a body in the car were the same (T. C-124-125; C-126:3-21).

The rejected video tape demonstrates graphically what happened to the body of a dummy even in a 5 mph crash. The dummy's head made an approximate nine-inch bulls-eye pattern in the windshield. The video tape was important, relevant evidence in the case because the defense constantly took the position that Mr. Onyeabor's accident was not substantial enough to cause the injuries complained of by Mr. Onyeabor (T. A-15:16, L-102:6-12, O-18:7-19). The defense also tried to prove that Mr. Onyeabor probably didn't hit his head during the accident sequence (T. A-13-14, D-421). A head trauma is relevant to prove closed-head brain injury (T. D-391:16). The video would have shown that a sudden deceleration at the speeds involved in Mr. Onyeabor's accident could have easily caused his head injury. Therefore, the judge committed a serious error in excluding this evidence.

Plaintiff's offer of Exhibit 114 does not run afoul of the hearsay rule. It was being offered as illustrative of Mr. Andrews' testimony, i.e., to show the principles of motion to which Mr. Andrews had testified. The video is essentially a two-minute series of photographs. A photograph which is qualified by expert testimony and is a reasonably accurate depiction of a relevant matter is often used to illustrate the

testimony of a witness. Appropriate photographs make testimony more readily understood by the trier of fact. Such a photograph is admissible and not hearsay. U.S. v. May, 622 F.2d 1000, 1007 (9th Cir. 1980). A video tape demonstration is admissible to illustrate principles that form an expert opinion, even though the circumstances of the actual event were different. Gladhill v. General Motors Corp., 743 F.2d 1049, 1051 (4th Cir. 1984).

B. Refusal and reluctance to allow examination by use of treatises. On numerous occasions, the court erroneously prohibited or seriously hindered Mr. Onyeabor's counsel from either establishing a treatise as authoritative or using it to rebut testimony raised by a defense expert. The most egregious example of this occurred during the rebuttal testimony of Dr. Linda Gummow during the eleventh day of trial. In the previous week, Dr. Clark had testified for the defense that a loss of consciousness is required to have a legitimate closed-head organic brain injury (T. L-77-79), and that substantially all of the learned literature in the field substantiated that point (T. L-109:1, 22; 178:18). Mr. Onyeabor's counsel posed that same question to Dr. Linda Gummow on rebuttal (T. M-32-36), and asked about the scientific literature. Dr. Gummow indicated that the scientific literature did not support Dr. Clark's proposition (T. M-32), and she was preparing to quote from treatises to rebut Dr. Clark when the court refused to allow it, stating:

> THE COURT: Well, I don't think that on her rebuttal testimony here I am going to let her read from documents that have not been previously considered. ...
> THE COURT: To now say we are going to bring in additional witnesses to read

> additional excerpts from treatises that were not mentioned before, I don't think that's proper.

(T. M-33-34). Rule 803(18), Utah Rules of Evidence, however, permits an expert to be examined with treatises. In this particular case, Mr. Onyeabor's counsel was trying to show that Dr. Clark was unfamiliar with the learned literature, which he had claimed to know (T. M-34:12-15. Since the adoption of the Uniform Rules of Evidence, such statements read from an authoritative medical text are admissible as substantive evidence in the case. Jenkins v. Parish, 627 P.2d 533, 539 (Utah 1981).

The court ultimately let Dr. Gummow read some of the articles (T. M-37-39), but only if she would first state her opinion and then use the treatise to buttress it. The court's unnecessary argumentation and circumscription ruined the strategic impact of counsel's cross-examination.

The issue of a medical text arose again a few minutes later when Dr. Gummow intended to read part of DSM III (a psychiatric diagnostic manual) to rebut some of Dr. Clark's diagnosis testimony on personality disorder (T. M-49-53). The judge sustained the objection, prohibiting Dr. Gummow from simply reading a passage which clearly rebuts Dr. Clark's diagnosis (T. M-50). Once again, the court prejudicially blunted the sharp focus prepared by counsel to rebut Dr. Clark's erroneous testimony.

The judge also committed error with respect to the use of treatises on at least three other occasions during the examination of Dr. Gerald Moress (T. D-444-445; D-452), and again

during an earlier examination of Dr. Gummow (T. F-841-2). Refusal to allow authentication of treatises was grounds for reversal in Jenkins v. Parish, supra at 538-539. The Court stated:

> The lower court's failure to allow plaintiff to independently authenticate professional works and consequently to use them on cross-examination of an adverse expert witness who professed no knowledge of the works resulted in prejudicial error by substantially curtailing plaintiff's ability to attack the testimony of Dr. Parish.

Id. at 539. The refusal to allow authentication and the hindering of authentication was strategically harmful to Mr. Onyeabor's examination of Dr. Clark. Dr. Clark simply refused to acknowledge the authoritativeness of the texts in general, insisting that he be directed to certain chapters or passages (T. L-175:14). The court thus committed reversible error.

C. Exclusion of important rebuttal witnesses. The court excluded the testimony of Joseph Johnson, Ph.D., and Devra Garfinkle, Ph.D., two professors that taught Mr. Onyeabor at the University of Utah (T. M-97-102). A proffer was made (T. M-98). The professors would have rebutted Dr. Clark's statements that Mr. Onyeabor's complaints suggesting brain injury began when Onyeabor's current counsel, Mr. Sykes, got involved in the case (T. L-148:9-17). Drs. Johnson and Garfinkle were prepared to say that they noticed sequelae of a brain injury long before Mr. Sykes got involved in the case. It was error to exclude such testimony.

D. Evidence of plaintiff's plans for the future. The court refused to allow Elizabeth Onyeabor, plaintiff's wife, to testify regarding their plans for the future if there had been no accident (T. J-143). The evidence was relevant to future earning capacity because it went to the issue of the types of jobs that Mr. Onyeabor could expect to hold, and it helped determine the value of the loss. The court labeled Mrs. Onyeabor's testimony as hearsay and speculation. In sustaining the objection, the court said, "And he's the one to tell us what his future plans were." (T. J-143:18). Ironically, when Mr. Onyeabor was later called and asked the question put to his wife earlier, the court sustained a defense objection again (T. M-3-4). It was error on both occasions.

E. Officer's opinion on fault. The court refused to allow Officer Leavitt to testify, based upon his investigation, as to who was at fault in causing the accident (T. B-59-62). Officer Leavitt had established himself as an expert in the field of accident investigation with many years hands-on experience in the area. Under Rules 702 and 704, his testimony should have been admissible. In Kelsay v. Consolidated Rail Corp., 749 F.2d 437 (7th Cir. 1984), the Court held that it was proper for a police officer who investigated a train-car crash to opine that it resulted from driving inattention. Accord: Gladhill v. General Motors Corp., supra (police officer who arrived at scene of accident was properly permitted to testify that accident resulted from failure to drive within a single lane, and that the

accident might have been caused by lack of familiarity with the vehicle).

The prejudice in the exclusion of this testimony is obvious. Under the facts of this case, astoundingly, the jury found Mr. Onyeabor to be 25% negligent (see discussion in Point IV below).

F. Exhibit 75, a purchase order. The court excluded Exhibit 75, a purchase order for a substantial amount of money issued to Mr. Onyeabor's company in Nigeria (App. 42) offered to show that he had a substantive business in Nigeria (T. G-152). The defense objected on grounds of relevance, which the court sustained (T. G-152:23-24). However, the exhibit was certainly relevant because the defense took the position throughout the trial that Mr. Onyeabor was not particularly successful (T. L-94-96, O-34-39) inferring that the company probably belonged to his brother, and that Mr. Onyeabor probably worked for his brother (T. L-94-95). The purchase order tended to substantiate Mr. Onyeabor's substantial lost earning capacity.

775/P3

POINT IV.

Erroneous Jury Instruction

THE COURT ERRED WHEN IT INSTRUCTED THE JURY THAT MR. ONYEABOR COULD BE FOUND TO BE CONTRIBUTORILY NEGLIGENT AND A PROXIMATE CAUSE OF THE ACCIDENT. THERE WAS INSUFFICIENT EVIDENCE ON WHICH THE JURY COULD BASE SUCH A FINDING.

STANDARD OF REVIEW AND APPLICABLE RULES OF LAW

An erroneous jury instruction which tends to mislead the jury or insufficiently or erroneously advises the jury on the law, is prejudicial error, Estate of Kesler, supra, if it is clear that a correct application would have produced different results. Hoffman v. Life Ins. Co. of North America, 669 P.2d 410 (Utah 1983). The adversely affected party is entitled to have the matter adjudicated under correct principles of law. Id. at 420. An erroneous instruction is presumptively harmful and ground for reversal unless it affirmatively appears in the record as a whole that the error was not prejudicial. Agee v. Kahului Trucking and Storage, Inc., 688 P.2d 256 (Hawaii 1984); Rowley v. Graven Bros. and Co., 491 P.2d 1209 (Utah 1971). One Utah case characterized the issue as whether the parties were given a fair trial and had the issues of fact and applicable law presented in a clear and understandable manner. Callahan v. Wood, 24 Utah 2d. 8, 465 P.2d 169, 171 (1970).

To successfully attack a jury verdict on the grounds of insufficient evidence, the appellant must marshall all of the

evidence supporting the verdict and then demonstrate that, even viewing the evidence in a light most favorable to the verdict, the evidence is insufficient to support it. Cambelt Int'l. Corp. v. Dalton, 745 P.2d 1239 (Utah 1987).

Generally, factual disputes are matters left to the jury. However, if the evidence on an issue so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case, then reversible error has been committed. E.A. Strout Western Realty Agency, Inc. v. W.C. Foy & Sons, Inc., 665 P.2d 1320 (Utah 1983). The appellant has a heavy burden to establish that the evidence does not support the jury's verdict and the factual findings implicit in that verdict. The evidence will be considered in a light most favorable to the verdict, and it will not be overturned when it is supported by substantial and competent evidence. Von Hake v. Thomas, 705 P.2d 766 (Utah 1985).

ARGUMENT

The court's instructions 21, 20 and 16 (R. 640, 639 and 634; App. 43) tell the jury that they can find the plaintiff negligent with respect to the facts of this case, for allegedly failing to keep a proper lookout or for driving too fast for existing conditions. Plaintiff's counsel objected strenuously to these instructions (T. N-6-8), and specifically to anything in the instructions that dealt with plaintiff's alleged negligence

(T. N-7:21-22). Plaintiff proposed that language be added to the instructions to the effect that the law does not require that a driver slow down when approaching an intersection (T. N-8:4-6), but that was rejected by the court.

There is no dispute on the critical aspects of the evidence regarding Mr. Onyeabor's approach to the accident scene on the day in question. He was driving at or under the speed limit (T. B-58); he was completely within his own lane (T. B-55:20-25; Ex. 5:2); there were no particular hazards on the road or hazardous traffic patterns (T. L-16:19); Mrs. Bates claimed she didn't see Mr. Onyeabor because he was partially obscured by another vehicle (T. B-47; Ex. 5:2, 4); she proceeded to travel almost due west from a private drive across three northbound lanes to the point of impact (T. B-50; K-49:12); at most, Mr. Onyeabor had between three-quarters of one second and one second to react to Mrs. Bates' illegal turn before he began his skid, and 1.8 to 2 seconds total in reaction and skid time before impact (T. C-114-115); and Mr. Onyeabor was between 250 and 300 feet from the intersection when Mrs. Bates inaugurated the accident sequence (T. C-115-117, K-49:20, C-74-75; Ex. 4). There was simply no evidence from which one could rationally conclude that Mr. Onyeabor was negligent.

The only evidence developed by the defense to impute contributory negligence to Mr. Onyeabor came by way of the testimony of Mr. Frank Grant, the defense accident reconstruction expert. He testified as follows:

> Q (Mr. Stegall): ... Were you able to form an opinion as to why the accident happened?

A (Mr. Grant): Yes.

Q. What is that opinion?

A. Bates entered the roadway, made a wide right turn so to speak; Mr. Onyeabor was traveling too fast to be able to adjust his speed in time to avoid her.

Q. Are there factors at the intersection relating to the speed of the Onyeabor vehicle with regard to your statement of "too fast"?

A. Yes. I am a little concerned about the speed of a vehicle approaching an intersection that is as close as the intersection of Fort Union Boulevard. It is about 100 at the point of impact; is less, much less than 100 feet from the stop line at Fort Union Boulevard. And given the information that I had about the density of the traffic at that particular time, the type of traffic at that particular time, and the intersection, I am a little concerned about why would a vehicle still be going at 45 miles an hour that close to an intersection. (Emphasis added)

(T. K-49-50). That opinion by Mr. Grant was totally without foundation and contrary to the facts. Mrs. Bates herself testified as follows:

> So I stopped there to look to see if there was (sic) any cars coming. I saw a white van, and I had plenty of time, so I pulled out into the lane and I looked to make sure again, and I pulled into the next lane, and that's when the collision was. (Emphasis added)

(T. L-16:19). Thus, even Mrs. Bates did not allege any particular hazards on the road because there was only one other vehicle and she had "plenty of time." She even checked twice. Therefore, according to Mrs. Bates' testimony, not only was the intersection not busy, there were no particular hazards.

There is no evidence that the intersection had anything to do with the accident. Mr. Grant did not point out any

specific hazards or "existing conditions" at the location on the day in question that would militate a reduced speed. He vaguely implied that the intersection was generally known to be busy (T. K-49:21-3), which seems irrelevant given Mrs. Bates' testimony. He was "a little concerned" about the speed of a vehicle as it approached that intersection; however, one would need to know specific information about hazards to say whether that was a safe speed on the day and moment in question. There was absolutely nothing pointed out to the jury to indicate that it wasn't a safe speed! Unless the defense could show some specific hazard of which Mr. Onyeabor should have been aware and which should have caused him to slow down, there was no basis for claiming that he was negligent. Allowing that issue to go to the jury was simply an invitation to speculate on evidence not in the record. Furthermore, there is no evidence that had Mr. Onyeabor been driving slower, the accident could have been avoided. As pointed out in Mr. Andrews' testimony, even if Mr. Onyeabor had been driving 40 mph, there still would have been a collision. (T. C-120).

Additionally, there is nothing in the Utah statutes which indicates that a driver cannot go the speed limit while approaching or crossing an intersection. U.C.A. 1953 §41-6-46(1)(a) (as amended 1987). It is uncontested that the speed limit applicable to Mr. Onyeabor was 45 mph (T. B-58, K-43:6), and even the defense did not claim that Mr. Onyeabor was exceeding the speed limit (T. K-43-46).

Essentially, the defense failed to prove any fact that would allow a reasonable juror to conclude that Mr. Onyeabor was driving too fast for conditions or failing to keep a proper lookout. It further failed to prove that even if Mr. Onyeabor was somehow negligent, he was a proximate cause of the accident. The fact of the matter is that the jury was simply allowed to speculate. The jury's prejudice against Mr. Onyeabor was demonstrated by the verdict. Under the circumstances recounted above, it found Mr. Onyeabor to be 25% negligent. That is an astounding result! The verdict should be reversed.

775/P4

POINT V.

Additur or New Trial

THE COURT ABUSED ITS DISCRETION IN NOT GRANTING MR. ONYEABOR AN ADDITUR. IN THE ALTERNATIVE, THE COURT ABUSED ITS DISCRETION IN NOT GRANTING MR. ONYEABOR'S MOTION FOR A NEW TRIAL.

STANDARD OF REVIEW AND APPLICABLE RULES OF LAW

Generally, the amount of a jury verdict is a matter exclusively for the jury. This is not so, however, where the award clearly indicates the jury's disregard of competent evidence or the influence of passion or prejudice. Batty v. Mitchell, 575 P.2d 1040 (Utah 1978). An additur is justified if it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence. Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961).

An appellate court should reverse a trial court's failure to grant a motion for a new trial only if the trial court abused its discretion. Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952). A trial judge may grant a new trial only if the jury's verdict is so contrary to the manifest weight of the evidence that the judge "cannot in good conscience permit it to stand." Holmes v. Nelson, 7 Utah 2d 435, 441, 326 P.2d 722, 726 (1958) (concurring opinion of Crockett and Wade, JJ); Goddard v. Hickman, 685 P.2d 530 (Utah 1984). The judge should order a new

trial in those rare cases when the jury verdict is manifestly against the weight of the evidence. Goddard, supra at 532.

ARGUMENT

- The Back Injury -

There was undisputed evidence that Mr. Onyeabor suffered a herniated lumbar disc as a proximate result of the accident. This was admitted by the defense orthopedic expert, Dr. Edward Spencer (T. I-10:19), who gave Mr. Onyeabor a 10% permanent partial impairment rating (T. I-19). On cross-examination, Dr. Spencer admitted that the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, published by the American Academy for Orthopedic Surgeons, was authoritative (T. I-32), and that the most likely scenario for Mr. Onyeabor, under that rating system, would indicate a 20% permanent partial impairment for a herniated disc (T. I-33-34). Dr. Thomas Soderberg, a well-known orthopedic surgeon, rated Mr. Onyeabor's permanent impairment from the herniated disc at 20% without surgery and 10% with surgery, if the surgery was successful (T. D-362). (Dr. Soderberg also gave Mr. Onyeabor a 10% permanent partial impairment rating due to his neck injury suffered in the accident (T. D-362).) Dr. Gerald Moress, a prominent Salt Lake neurologist, gave Mr. Onyeabor a 10% permanent partial impairment due to the herniated disc, if the surgery were successful (T. D-410), but a 20% permanent partial impairment if the surgery were not successful and he did not

expect it to be successful because of Mr. Onyeabor's lack of emotional stability (T. D-411-412).

Mr. Onyeabor received a verdict from the jury for $16,850.00 (R. 663), almost exactly the amount suggested by Mr. Stegall in his closing argument (T. O-34-40). It is common knowledge that a herniated disc case has a value of $40,000 to $50,000 to settle in Salt Lake County. The amount of the verdict, considering just the back injury alone, suggests passion and prejudice by the jury, and is grossly inadequate.

- The Brain Injury -

Three doctors testified for plaintiff who are qualified to evaluate permanent impairment from a brain injury. Dr. Moress, a neurologist, testified that Mr. Onyeabor's impairment for the brain injury was 35%, for a total of 42% when combined with the back injury (T. D-417). Dr. Richard Goka, a Salt Lake physiatrist (a specialist in rehabilitation medicine), and the medical director at the Department of Rehabilitation Medicine at Holy Cross Hospital, considered the brain injury impairment to be 36% (T. E-538). Dr. Duncan Wallace, a Salt Lake psychiatrist and the former president of the Utah Psychiatric Association (T. E-651), indicated that Mr. Onyeabor's permanent overall impairment due to the brain injury was 34% (T. F-710:23).

The defense produced no substantial, believable evidence to the effect that Mr. Onyeabor did not have a brain injury due to the accident. Dr. Robert Cook, the defense psychologist, admittedly had little or no experience in the area of head injury. He was not familiar with any of the major texts

on head injury (T. K-121). At his deposition, Dr. Cook was asked the following question, which was read to him at trial:

> Mr. Sykes: "So you feel that you're not qualified to do a primary examination to determine if someone is organically brain injured"?
> Answer: "Yes, I would say that."
> (Emphasis added)

(T. K-125:8; Cook deposition p. 39:5). Dr. Cook further admitted that organic brain injury was not one of his "specialties" (T. K-124:9-25). Dr. Cook was not familiar with brain injury terminology (T. K-123-124, K-126-127, K-128:20, K-129:6, K-129:22, K-130:13). Seventy-five percent of Dr. Cook's professional income came from doing court evaluations for defense attorneys and insurance companies (T. K-134:6). In the ten years prior to his testimony, Dr. Cook had seen perhaps 12 or 13 patients who had brain damage, but did not see them or treat them for that purpose (T. K-137-138:2). In fact, Dr. Cook had never even treated anybody for organic brain injury (T. K-138:6). In summary, it would have been very difficult for a fair jury to give much credence to any opinion that Dr. Cook had on the issue of brain injury.

Dr. Lincoln Clark testified very cogently to the effect that Mr. Onyeabor did not have organic brain injury (T. L-101-102). Undoubtedly, Dr. Clark was a main reason for the jury's low verdict. Dr. Clark should not have been allowed to testify on brain injury (see discussion in Point II above). Even so, his opinion should have been of questionable value to an unprejudiced jury. In a March, 1986, trial, he had not considered himself to

be a "specialist" on brain injury (T. L-113,114). He had only become an expert in his own mind through court cases that he had during that intervening year (T. L-114). He credited plaintiff's counsel, Mr. Sykes, with having helped him to become an expert in the area (T. L-114).

The verdict reflects the jury's belief that Mr. Onyeabor did not have a head injury. That is obviously a result of the prejudice engendered by a combination of the judge's comments on the evidence, judicial interjections and interruptions, erroneous evidentiary rulings and instructions, and perhaps other latent prejudices. The Court would be justified in granting Mr. Onyeabor's Motion for an Additur in an amount far in excess of $200,000[1], the amount originally requested. This is fair, and preferable to granting a new trial. Mr. Onyeabor expended (or incurred liabilities) in excess of $30,000 in costs to prepare and try the case, plus $6,500 for appellate transcripts. Absent the prejudice engendered by the numerous comments on the evidence and other errors, Mr. Onyeabor certainly would have had a verdict in excess of $200,000, that being a low amount. Therefore, rather than burden the Court system with a re-trial of this case, the Court should simply grant a reasonable additur. In the alternative, the Court should grant a new trial because the evidence was insufficient to justify the verdict.

1 / Mr. Onyeabor turned down a settlement offer of $125,000 prior to trial.

CONCLUSION

The lower court made in excess of 40 comments on the evidence by way of direct statements and/or unwarranted interjections and interruptions. Many of these comments were extremely prejudicial and tended to cast Mr. Onyeabor's experts and evidence in substantial disrepute in the eyes of the jury. The court unduly interfered with Mr. Onyeabor's presentation of evidence and cross-examination of witnesses. The court's demeanor and body language during the trial demonstrated favoritism toward the defendants' case, and communicated the court's belief that the quality and credibility of Mr. Onyeabor's evidence was lacking. This caused Mr. Onyeabor extreme prejudice and denied him a fair trial.

Dr. Clark's reappearance in the case as an expert witness for the defense was a surprise which Mr. Onyeabor could not have guarded against in the exercise of reasonable caution. Lack of notice of Dr. Clark as a witness and failure to provide a timely, complete report appear to have been the result of contumacious conduct, and should not be sanctioned by the Court. It denied Mr. Onyeabor the right to effective cross-examination, and significantly prejudiced his case.

There were numerous evidentiary errors, including the erroneous exclusion of relevant admissible evidence and improper jury instructions. Mr. Onyeabor was thereby prejudiced. Each of

the erroneous exclusions of evidence, or other evidentiary errors, constituted reversible error.

The cumulative effect of the comments on the evidence, the judicial interruptions, the admission of Dr. Clark's testimony, and the evidentiary errors was devastating to the Mr. Onyeabor's case.

The Court should grant Mr. Onyeabor's Motion for an Additur in a reasonable amount. This would avoid the wasteful necessity of trying the case again. In the alternative, the Court should reverse the trial court and remand this case for a new trial on all issues.

DATED this 22nd day of July, 1988.

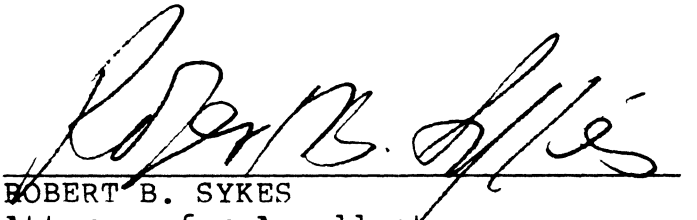
ROBERT B. SYKES
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the aforementioned APPELLANT'S BRIEF upon the attorney listed below by placing a true and correct copy thereof in an envelope addressed to:

William A. Stegall, Jr., Esq.
GUSTIN, ADAMS, KASTING & LIAPIS
48 Post Office Place, Third Floor
Salt Lake City, Utah 84101

and hand-delivering same to Mr. Stegall at the above address on the 22nd day of July, 1988.



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